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Supreme Court, U.S.
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Docket No. 98-1466

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

THOMAS PAGE, Warden,

Petitioner,

-vs-

JERRY MAHAFFEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENT'S MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

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9 pp

RESPONDENT'S MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Respondent, Jerry Mahaffey, moves this Court pursuant to Supreme Court Rule 39 for leave to proceed *in forma pauperis*. In support of this motion, Respondent states as follows:

1. Respondent is an indigent inmate, incarcerated in Illinois state prison.

2. Respondent was granted leave to proceed *in forma pauperis* in both the District and the Circuit Courts in the proceedings below.

3. Both the District and Circuit Courts below appointed the undersigned counsel to represent Respondent in these federal habeas proceedings pursuant to 21 U.S.C. § 848(q).

Wherefore, Respondent, Jerry Mahaffey, respectfully requests that he be granted leave to proceed *in forma pauperis*.

Respectfully submitted,

Alan Freedman

Counsel for Respondent

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ON PETITION FOR A WRIT OF CERTIORARI
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BRIEF FOR RESPONDENT

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SUMMARY OF ARGUMENT

Certiorari is inappropriate because each of the three questions presented by Petitioner are irrelevant to this case. Specifically, Petitioner's first question presented--pertaining to the standard of review to apply in reviewing a trial court's conclusion that there has been no prima facie case of discrimination under *Batson v. Kentucky*, 476 U.S. 79 (1986)--is irrelevant because the Seventh Circuit expressly concluded that it would have reached the same decision under any standard of review in that the state trial court's conclusion that there was no prima facie case of discrimination was clearly erroneous; and Petitioner's second and third questions presented are irrelevant because they are nothing more than hypothetical, academic questions that have absolutely no bearing on this case.

ARGUMENT

I. Certiorari is inappropriate because the standard of review question raised by Petitioner is irrelevant in that the Seventh Circuit explicitly found that its decision would have been the same under any standard of review.

Petitioner argues that this Court should grant certiorari to decide "the standard of review an appellate court should apply when reviewing a trial court's finding [of no] prima facie case under *Batson v. Kentucky*, 476 U.S. 79 (1986)." (Cert. Pet. at i).[1] However, given the prosecutors' egregious conduct in utilizing peremptory challenges in this racially sensitive case to exclude all seven African-Americans from the venire, the standard of review question is ultimately irrelevant because the Seventh Circuit found that a prima facie case existed under any

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[1] It is worth noting that, notwithstanding Petitioner's first question presented, this case actually does not involve appellate review of a trial court's findings. Instead, this case involves habeas proceedings challenging Respondent's convictions and sentence of death. Respondent also notes that the standards for adjudication set forth at 28 U.S.C. Sec. 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), do not apply here because these habeas proceedings were pending on April 24, 1996, the effective date of the AEDPA.

standard of review. (App. A9).[2] As the Seventh Circuit explained,

> We recognize, of course, that Batson requires us to look to all the relevant facts and circumstances in assessing whether an inference of discrimination should arise. . . . Yet by far the most important factor in this case, and one that the Illinois courts were too quick to overlook, is that all seven African-American members of the jury venire were excused by the State, meaning that not a single member of Mahaffey's own race was seated on the jury that decided his fate. This is therefore not a case in which only one or two members of a particular racial group were excused while other members of the same racial group remained; it is instead a case where the State exercised seven of thirteen total challenges to exclude every member of Mahaffey's own race. . . . The Supreme Court in Batson emphasized that an inference of discrimination may arise where the prosecutor makes a pattern of strikes against African-American jurors. 476 U.S. at 97. Such a pattern is plainly evident in the State's juror challenges here, where the prosecutor excused each and every African-American member of the jury venire. . . .
>
> And lest we forget, the crimes at issue in this case were obviously racially-sensitive--Mahaffey, a young African-American male from Chicago's South side, was charged with murdering a white couple on the North side, and with attempting to murder their young son. This is therefore a case in which the racial composition of the jury could potentially be a factor in how the jury might respond to Mahaffey's defense at trial, as well as to his arguments in mitigation at the capital sentencing phase.

(App. A9-11) Given the egregiousness of these circumstances, the Seventh Circuit found

> [u]ltimately, however, the standard of review question is largely beside the point, for even if a more deferential standard were applied, we would have to conclude that Judge Hett clearly erred in finding that no inference of discrimination arose from the facts and circumstances here.

(App. A9). Certiorari should not be granted to address what is, ultimately, an irrelevant issue.

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[2] Respondent will cite to the Seventh Circuit opinions in this case as they are included in Petitioner's Appendix to the Petition for a Writ of Certiorari. Thus, for example, "App. A9" refers to page 9 of Appendix A to Petitioner's Appendix to the Petition for a Writ of Certiorari.

PUBLISHER'S NOTE:

Page 3 is missing in original document.

III. Certiorari is inappropriate on Petitioner's third question presented--"Whether an appellate court may, if the record is sufficient, conduct the step-two and step-three inquiries under *Batson* if it determines that [the trial court erred in finding no prima facie case]?"--because that question also is irrelevant in that, as the Seventh Circuit found, the record here is inadequate to do so.

Petitioner has asked this Court to address "whether an appellate court may, *if the record is sufficient*, conduct the step-two and step-three inquiries under *Batson*?" (Cert pet. at i) (emphasis added). Regardless of whether an appellate court could, as a theoretical matter, conduct such inquiries with an adequate record, the record in this case is inadequate to do so. Specifically, as the Seventh Circuit explained in addressing this very question:

> The state trial court, state supreme court, district court, and the State itself in its brief, all maintain that the Batson hearing was limited to the prima facie determination. Although the State provided more detailed reasons for its challenges than is perhaps necessary at that stage, it has consistently asserted that it never provided the actual reasons for its challenges of each potential African-American juror. See, e.g., Brief of Attorney General at p.13 (arguing that only "apparent," not actual reasons were provided and declaring that "the prosecution never tendered `race-neutral' reasons at trial, nor during any appellate proceedings, state or federal."). Instead, the State limited its explanations to identification of "apparent" similarities on the record between excluded white venireperson and excluded African-Americans, arguing that those apparent similarities negated any inference of discrimination. Those apparent similarities, however, cannot be mistaken for the actual reasons for the challenges. Only after the defendant establishes a prima facie case is the State required to reveal its actual reasons for the exclusions. Moreover, at that stage, the relevant comparison is between the excluded African-Americans and the jurors that were allowed to sit on the jury. Because the trial judge never reviewed the actual reasons for the challenges and did not compare the excluded African-American venirepersons with those accepted on the jury, we are limited on appeal to determining whether the prima facie showing was met.
>
> We note that this conclusion would be mandated in any case because the trial court informed Mahaffey that he could respond to the raceneutral reasons after the prima facie determination was made. Although Mahaffey's counsel argued at some length that the challenges demonstrated discrimination, he also repeatedly noted that he would respond in more detail if the court determined that the prima facie showing was met. The court ultimately found to the contrary, of course, and thus Mahaffey never had the opportunity to address the State's rationale for excluding the African-Americans. *In those circumstances, it would be inappropriate for us to proceed on appeal to the*

ultimate issue of discrimination even with a more complete record.

(App. A5-8) (emphasis added).

In sum, Respondent has not come forward with what it claims were its "actual" (as opposed to "apparent") explanations for its peremptory challenges.[4] Moreover, even if the State's "apparent" explanations were in fact its "actual" explanations, Respondent has never had an opportunity to address those explanations. Because the record in this case is inadequate for any reviewing court to proceed to the step-two and step-three inquiries under *Batson*, certiorari is not appropriate in this case to decide whether a reviewing court could proceed to those inquiries in a theoretical case where there was in fact an adequate record to do so.

CONCLUSION

For these reasons, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

Alan Freedman

One of the Attorneys for Respondent

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[4] It is not clear from the Petition for a Writ of Certiorari whether Petitioner is now asserting that its "apparent" explanations were in fact its "actual" explanations. Respondent submits that this Court should not even consider Petitioner's third question presented until Petitioner clarifies in a reply brief to this Court whether it is now taking the position that its "apparent" explanations were in fact its "actual" explanations. However, as explained by the Seventh Circuit and in the text, even if Petitioner is now taking that position, the record in this case is inadequate to proceed to the step-two and step-three inquiries because Respondent has never had a chance to address those explanations.

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April 8, 1999

Clerk of the Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

Re: *Page v. Mahaffey*, No. 98-1466

Dear Clerk:

Please find enclosed for filing the original plus ten copies of Respondent's Motion for Leave to Proceed *In Forma Pauperis*, the original plus ten copies of the Brief in Opposition, and a certificate of service.

If there are any questions, please call me at (312) 726-1731.

Sincerely,

Alan Freedman

Alan M. Freedman
Counsel for Respondent, Jerry Mahaffey

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that he caused copies of RESPONDENT'S MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and BRIEF FOR RESPONDENT to be served on the following counsel for Petitioner, Thomas Page, at the addresses so indicated by first class United States Mail, proper postage prepaid, on April 8, 1999.

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